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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1229

A-OK MOTOR LINES, INC. (SAMUEL KAUFMAN,
TRUSTEE IN BANKRUPTCY),

Petitioner,

vs.

NORTH ALABAMA EXPRESS, INC., ET AL.,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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Dated: March 6, 1979

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A brief response to respondents' "Reply to Petition for Writ of Certiorari" is necessary in view of certain statements set forth therein.

On page 6 respondents refer to the June 28, 1976 order entered by the entire Interstate Commerce Commission, and state that the rendition of such order "rendered the administrative proceeding final."¹ This is not correct. Such order expressly provided:

1. Counsel for respondents made the same erroneous statement in closing oral argument before the court below, and subsequently corrected such error by letter to the court dated January 31, 1978.

"It is ordered, That the said petitions be, and they are hereby denied, without prejudice to the future filing of such petitions as may be appropriate." (A90).

On page 7 respondents state that the ICC's final order, which "reversed"² its prior orders, was issued "[w]ithout further notice." This is not correct. Respondents had actual notice of the applicants' request for approval of their amended applications and filed a brief in opposition thereto.

On page 15 respondents state that this case does not involve a situation "where the question of PCN has been determined by the Commission," and that "there was no proof of any need for interstate operations except as they were indicated by the intrastate operations." Neither statement is correct. The Commission found that approval of each application under §207 of the Act was required by "the present and future public convenience and necessity." (A68, A70, A72, A73, A106). That finding was supported by evidence presented by 62 shipper witnesses and 5 connecting motor carriers. The Administrative Law Judge, after making detailed findings of fact concerning the testimony of such witnesses, concluded that "the testimony of numerous shipper witnesses supports the conclusion that the proposals of the vendees will be responsive to a public need." (A66). These findings were adopted and affirmed by the Commission (A106).

2. The ICC did not "reverse its prior orders." The prior orders dealt with the applications as *originally filed*. The order under review dealt with the applicants' *amended* proposal—a proposal correctly characterized by respondents (p. 7) as "a new proposal," which "was based on a new factual situation." (p. 8).

Throughout their brief, respondents raise the question of the adequacy of notice of the Commission's action.³ The Court below clearly stated that:

"We do not reach the questions concerning the sufficiency of notice and whether the evidence is sufficient to support an 'unrelated' application if the testimony taken under the Elliott Doctrine were eliminated. Our decision makes such further inquiry inappropriate." (A17).⁴

Therefore, no question of notice is involved. If it were, respondents would have no standing to raise such question since they had actual notice of and actively participated in every stage of the proceeding.

Respondents also suggest that they were prejudiced because no further hearing was held after the applicants amended their proposal before the Commission.⁵ Respondents made no request for a further hearing. The applicants, on the other hand, did request that a further hearing be held if the Commission deemed such a hearing necessary. Respondents *opposed* that request.

If lack of proper notice or further hearing constituted an infirmity in the Commission proceedings, the court should have remanded the proceeding with instructions to provide such notice or conduct such hearing. Instead, the court remanded the case "with instructions that Division 3's order now under review be vacated and set aside." (A20).

3. See, e.g., pp. 12, 15, 16, 17.

4. This quotation also appears on page 8 of the respondents' brief.

5. See, e.g., pp. 6 (n.5), 12, 15, 16, 17.

The judgment and opinions of the court below should
be reviewed by this Court.

Respectfully submitted,

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Date: March 6, 1979